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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS

Master Docket No. 11-CV-2509-LHK

**ADMINISTRATIVE MOTION TO
ENFORCE LOCAL RULE 7-3(d)(1) AND
STRIKE DEFENDANTS' IMPROPER SUR
REPLY**

Pursuant to Local Rule 7-11, Plaintiffs respectfully submit this administrative motion to enforce Local Rule 7-3(d)(1) and strike Defendants' July 19, 2013 "Objections to Evidence," Dkt. 469. Defendants' filing violates Local Rule 7-3(d)(1) because it is an improper sur-reply against Plaintiffs' pending Supplemental Class Certification Motion.

I. Defendants' Filing Is Prohibited "Further Argument"

Defendants filed their sur-reply pursuant to Local Rule 7-3(d), which permits brief objections to new evidence submitted in support of a motion. The Rule expressly prohibits "further argument on the motion." L.R. 7-3(d)(1). Defendants' sur-reply is almost entirely "further argument." The majority of the filing is an argument that Plaintiffs have somehow unfairly characterized the testimony of Drs. Murphy and Shaw. Although Defendants try to frame their argument as an issue of completeness, in every instance in which Plaintiffs cited or quoted deposition testimony, Plaintiffs filed deposition designations that contained the entire preceding question and the entire answer. In fact, Plaintiffs also filed the transcript page before and after each complete designation. *See* Decl. of Anne B. Shaver In Support of Pls.' Supp. Mot. for Class Certification, Exs. N and O (Dkt. 456). That is why the sur-reply itself cites to the Shaver Declaration for the testimony Plaintiffs supposedly omitted. Sur-Reply 2:2, 4, 9, 11, 23, 27; 3:8, 10, 12, 13; 5:6, 10. Defendants' purpose is not to supplement the record, it is to submit impermissible "further argument on the motion." L.R. 7-3(d)(1). Plaintiffs accurately represented—and in most places quoted—the sworn testimony of Defendants' experts. Dr. Murphy indeed admitted that averaging aggregate data at an appropriate level is a valid statistical tool for detecting systematic effects. Dr. Shaw admitted she did not assess the degree to which Defendants controlled and managed whatever discretion junior managers had. Defendants' desire to distance themselves from their own experts' testimony does not justify their submission of new argument.

This is not the first time Defendants have flouted the Local Rules and this Court's orders by submitting additional argument. *See* Nov. 12, 2012 Order re Administrative Motions (Dkt. 242) (prohibiting Defendants from filing a reply in support of their unauthorized motion to strike, and requiring Defendants to comply with Civil Local Rules 7-3(a) and 3-4(c)(2) concerning font,

font size, and line spacing); and May 15, 2013 Case Management Order (Dkt. 421) (“If the parties intend to move to strike any of the expert testimony or other evidence offered in connection with class certification, the parties must make such motion within the page limits allotted for the class certification briefing.”). This time, Defendants again failed to meet and confer with Plaintiffs prior to filing their improper sur-reply. Declaration of Dean M. Harvey in Support of Plaintiffs’ Administrative Motion (“Harvey Decl.”) ¶ 2. On Monday, July 22, 2013, Plaintiffs wrote Defendants and explained that their sur-reply violated the Local Rules and should be withdrawn. Harvey Decl. ¶ 3 and Ex. A. Plaintiffs offered to meet and confer on the matter. *Id.* Defendants did not meet and confer regarding the request and refused to withdraw the sur-reply, requiring further burdening of the parties and the Court with the instant administrative motion. Harvey Decl. ¶ 4 and Ex. B. Such serial and knowing violations of the Local Rules should not be permitted to continue.

II. Dr. Leamer Did Not Provide A New Theory In His Rebuttal Supplemental Report

Defendants claim Dr. Leamer’s rebuttal supplemental report contains a “new” and “incorrect” theory that the effects of cold calls are greater than the sum of the individual calls; in other words, they are “*superadditive*.” Sur-Reply 4:8 (emphasis in original). Defendants apparently fail to realize that the term “super-additive” was first used by Dr. Murphy, not Dr. Leamer. Dr. Murphy testified that “super-additive” is a “term that people use” to refer to social influences that “reinforce one another to create a greater effect than you would have if you simply added them together” Murphy Dep. 463:5-11. Dr. Murphy also explained that “the existence of social effects can enhance the direct effects, or the individual level effect,” *id.* 463:19-21, and Dr. Murphy agreed that “if there are enough social influences that are complementary, they can reach a tipping point that will actually provoke a major change”: “Yeah. You can build those models. I mean, we have some in the book. You can build those kind of models for sure.” *Id.* 466:2-8. Dr. Leamer made clear that his use of the term “super-additive” is in direct response to Dr. Murphy. Leamer IV ¶ 20 (“or to use Dr. Murphy’s preferred term, ‘super-additive’”).

While Dr. Murphy introduced the term, the idea is not new. Dr. Leamer’s reports from

1 last year discussed at length how “small changes in the information flow have large
 2 consequences.” Leamer II ¶ 5. *See also* Leamer I ¶¶ 71-76, 84 (discussing price discovery);
 3 Leamer II ¶¶ 34-40 (discussing how suppression of even small amounts of information can have a
 4 profound effect on pay levels throughout a firm). At his deposition, Dr. Leamer referred to his
 5 earlier report on this topic and explained that individual solicitations that Defendants “think of as
 6 small” are important because: (1) Defendants “chose to interfere in these specific channels”; and
 7 (2) “information economics allows for what seemed like small changes in the informational flow
 8 to have large impacts on the equilibrium.” Leamer Dep. 830:7-831:15 (referencing the Nobel
 9 Prize winning work of Joseph Stiglitz on information economics, summarized at Leamer II ¶ 37).
 10 As Drs. Leamer and Hallock have explained repeatedly, an estimate of the effects of Defendants’
 11 anti-solicitation agreements must account for the systematic impact of suppressed information
 12 and of top-down efforts to adjust pay structures. *See* Leamer I ¶¶ 71-76, 81-88, 107-134; Leamer
 13 II ¶¶ 5, 7, 11-56; Leamer III ¶¶ 14-21; Leamer IV ¶¶ 3, 4, 8-35, 38, 67; Hallock ¶¶ 8, 10-240.

14 Defendants’ senior executives who had responsibility for company-wide pay entered into
 15 the anti-solicitation agreements to eliminate entire channels of competition, not to eliminate any
 16 individual solicitation. The effect of a key competitor going “A through Z” and calling
 17 “everybody that was a mid-level engineer and above,” Campbell 30:16-22, is much more than
 18 merely the sum of individual calls: “it messes up the pay structure. It does. It makes it very high.
 19 . . . That’s just the reality we’ve got. And I do feel strongly about it.” Catmull 179:17-25. One
 20 cannot estimate the effects of Defendants’ company-wide anti-solicitation agreements by
 21 examining only individual employees, ignoring systematic effects and the voluminous supporting
 22 record. When acting as scholars rather than litigation consultants, Defendants’ own experts
 23 agree. *See, e.g.*, Ex. 2857 (excerpt from “Social Economics: Market Behavior in a Social
 24 Environment,” by Gary Becker and Kevin Murphy, at p. 15: “The social multiplier creates a
 25 cascading effect as members of a social group influence and reinforce one another’s behavior.”);
 26 Ex. 2847 (“Insider Econometrics: A Roadmap with Stops Along the Way,” by Kathryn Shaw).

27 There is nothing “new” or “incorrect” about Dr. Leamer’s rebuttal analysis. Defendants’
 28 “objection” should be denied.

1 **III. Dr. Leamer's Examination of Dr. Shaw's Unsupported Hypothesis Is Proper**
 2 **Rebuttal**

3 Defendants also argue that Dr. Leamer's rebuttal analysis of Defendants' salary ranges is
 4 "untimely" and "misleading." Sur-Reply 4:24. While Dr. Hallock conducted a detailed empirical
 5 analysis of Defendants' pay ranges, Dr. Shaw ignored them and provided the unsupported
 6 hypothesis that Defendants' pay ranges were irrelevant to actual employee pay. Dr. Leamer
 7 investigated this hypothesis by comparing Defendants' pay ranges with Defendants'
 8 compensation data. Dr. Leamer confirmed that Dr. Shaw is incorrect. Supp. Reply 14; Leamer
 9 IV ¶ 67. Defendants concede the accuracy of Dr. Leamer's result and there is nothing misleading
 10 about it. Dr. Shaw is simply wrong. Defendants are under the misimpression that they can assert
 11 anything in an opposition, no matter how unsupported or outlandish, and Plaintiffs cannot rebut
 12 that assertion with facts.

13 **IV. Plaintiffs Provided Defendants with The Sandberg Declaration Over A Month**
 14 **Before Their Opposition Was Due**

15 Finally, Defendants seek to strike the Sandberg Declaration on the basis that Plaintiffs
 16 "waited until the reply to submit her declaration, leaving Defendants with no opportunity to
 17 respond." Sur-Reply 5:14-17. In fact, pending discovery concerning Ms. Sandberg was
 18 discussed at the May 15, 2013 Case Management Conference, five days after Plaintiffs filed their
 19 supplemental class certification motion. The Court instructed Plaintiffs to resolve the matter
 20 promptly and, two days later, Plaintiffs concluded the issue by obtaining a declaration from
 21 Ms. Sandberg that was produced immediately to Defendants. *See* May 17, 2013 Joint Discovery
 22 Status Report (Dkt. 423). Defendants filed their opposition to the supplemental class certification
 23 motion on June 21, 2013, over a month later. Notably, Defendants ignored the declaration and
 24 sought no discovery of their own into Ms. Sandberg's statements.

25 **V. Conclusion**

26 For the foregoing reasons, Plaintiffs' administrative motion should be granted.
 27
 28

1 Dated: July 23, 2013

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